



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0711-17

MARIAN FRASER, Appellant

v.

THE STATE OF TEXAS

**ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SEVENTH COURT OF APPEALS
MCLENNAN COUNTY**

SLAUGHTER, J., filed a dissenting opinion.

DISSENTING OPINION

We are the only high court in America that interprets its felony-murder statute in a way that permits unlimited strict first-degree criminal liability for any accidental death arising from the commission or attempted commission of any felony (except manslaughter or lesser-included offenses of manslaughter).¹ I believe our current interpretation is wrong. It runs

¹ See Sections II.A., D., *infra*. While it is possible that another high court applies felony murder as broadly and as liberally as this Court does, I have yet to find an example of such application after extensive research.

contrary to both the plain language of the felony-murder statute and the Legislature's criminal-justice grading scheme.

Introduction

Our felony-murder statute, Texas Penal Code Section 19.02(b)(3), provides that a person commits an offense if she “commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, [s]he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.” As discussed in more detail below, the plain language of our felony-murder statute intentionally contains restrictions on its application. It requires both a felony (or attempted felony) and an aggravating factor of a separate act clearly dangerous to human life that is distinct from the felony's elements. That clearly-dangerous separate act must also be committed in the course of and in furtherance of the felony's commission. And the separate act (not the felony) must be the act that causes the death of another. This interpretation not only gives effect to all the words and phrases the Legislature included in the statute, but it also gives effect to the Legislature's criminal-justice grading scheme which requires proof of additional aggravating factors before a felony level and/or punishment range is increased.

Such statutory analysis should be conducted in the Court's majority opinion because in granting the State's petition for discretionary review, the Court designated the following issue: “Can the felonies of reckless or criminally negligent injury to a child or reckless or

criminally negligent child endangerment underlie a felony-murder conviction when the act underlying the felony and the act clearly dangerous to human life are one and the same?” The answer to that question should be “no.” But the Court today does not answer this question. Instead, as indicated by the majority opinion, the Court on its own seems to have changed the question to: “Is the offense of injury to a child or child endangerment a lesser-included offense of manslaughter so as to exempt these offenses from serving as predicate felonies of felony murder?” The Court’s opinion, without statutory analysis of Section 19.02(b)(3), finds that they are not lesser-included offenses and summarily concludes the felony-murder statute was properly applied.

I believe the Court’s opinion and approach are wrong for three main reasons.

First, the Court does not answer the designated issue. It addresses only the first half of the issue as to whether the underlying felonies in this case were lesser-included offenses of manslaughter. It does not address whether a felony-murder conviction can stand “when the act underlying the felony and the act clearly dangerous to human life are one and the same.” In explaining why it declines to address this issue, the majority opinion simply notes, in a footnote, that our existing precedent forecloses any argument that the felony-murder statute requires proof of a dangerous act that is distinct from the underlying felony. *See maj. op.* at 11 n.39. In my view, however, the precedent referred to in the majority opinion is flawed and should be abandoned. This case presents an appropriate vehicle for revisiting such precedent, but the majority opinion declines to do so.

Second, in reaching an answer on the first half of the designated issue regarding whether the underlying felonies were lesser-included offenses of manslaughter, the Court relies on a judicially created construct rather than the plain language of the statute to reach its answer. The statute solely exempts manslaughter; it does not exempt lesser-included offenses of manslaughter. Rather than relying on the statute, the Court relies on its prior caselaw where it decided to add to the statute an exemption for these lesser-included offenses. *See, e.g., Garrett v. State*, 573 S.W.2d 543 (Tex. Crim. App. 1978); *Johnson v. State*, 4 S.W.3d 254 (Tex. Crim. App. 1999).

Third, the Court's prior cases interpreting and applying our felony-murder statute (unaddressed by the Court's opinion in this case despite being part of the designated question) do not give effect to all of the words and phrases selected by our Legislature. By failing to give effect to the Legislature's intent, the Court's interpretation allows for any accidental or unintentional death resulting from the commission or attempted commission of a felony (regardless of the actor's *mens rea*) to be prosecuted as first-degree felony murder even if the felony and the act causing death are entirely one and the same. The Court's interpretation requires simply a felony or attempted felony and a resulting death. It does not require any additional aggravating factor despite the statute calling for "an act clearly dangerous to human life that causes the death," which must be committed "in the course of and in furtherance of" the felony or "in immediate flight from" the felony. Such interpretation, in turn, advances an application of our felony-murder statute that runs contrary

to our criminal-justice grading scheme which requires proof of an additional aggravating factor before a felony level and/or punishment level can be elevated. Instead, the Court's current application allows virtually any felony (state-jail felonies included) resulting in an accidental or unintended death to be elevated to first-degree felony murder with a punishment range of up to life in prison without the involvement of any aggravating factor and with no regard for the actor's mental culpability. Relying on the plain language of the statute and our overall criminal-justice grading scheme, I believe the Legislature intends for the "clearly dangerous act" to be separate and distinct from the felony before the imposition of first-degree-felony liability is justified. Otherwise, as the Court observed in *Garrett* more than forty years ago, the felony-murder statute may have the practical effect of undermining our normal murder statute by permitting first-degree felony liability for all assaultive conduct leading to death, in the absence of any proof of an intentionally or knowingly caused death. *See Garrett*, 573 S.W.2d at 545.

This third issue has the biggest and most widespread impact on our criminal-justice jurisprudence. Therefore, the remainder of this opinion will focus on what I believe is the Legislature's intended interpretation of our felony-murder statute. This opinion, after briefly reviewing the relevant background of this case, will: (1) analyze the plain language of the statute; (2) discuss the history of felony murder in America; (3) discuss the history of felony murder in Texas; (4) examine the legislative history of our current felony-murder statute; (5) examine how the courts of other states interpret their felony-murder statutes; and (6) illustrate

that this Court’s felony-murder opinions over the past forty years run contrary to the plain-language interpretation I urge this Court to adopt.

Background Facts and Procedural Posture

For more than twenty years, Appellant operated a home daycare for babies under two years old. Tragically, a four-month-old baby died in her care. The autopsy revealed that the baby had a toxic level of diphenhydramine (an antihistamine found in medications like Benadryl) in her system. Through an investigation, it was discovered that Appellant had been dosing all the babies in her care with diphenhydramine so they would sleep during naptime. According to expert testimony, babies under the age of two cannot process diphenhydramine because their livers are not fully developed. As a result, repeated small dosages of diphenhydramine will accumulate in a baby’s body, which can result in “unknown consequences” including, as in this case, death.

Appellant was convicted by a jury of felony murder and sentenced to fifty years in prison. The indictment alleged that Appellant “committ[ed] or attempt[ed] to commit an act clearly dangerous to human life, namely, by administering diphenhydramine to [the victim] and/or causing [the victim] to ingest diphenhydramine, which caused the death of [the victim], and the said Defendant was then and there in the course of or attempted commission of a felony, to-wit:” injury to a child or child endangerment.² The jury instructions tracked the indictment and permitted conviction on a finding that Appellant had committed either of

² C.R. at 6.

the alleged predicate felony offenses intentionally, knowingly, recklessly, or with criminal negligence.

The court of appeals reversed Appellant's conviction. It reasoned that the conviction was potentially based upon a reckless or criminally-negligent act that caused the complainant's death, which would run afoul of the statutory provision exempting manslaughter (a recklessly-caused death) as a predicate for felony murder.³ *Fraser v. State*, 523 S.W.3d 320, 334 (Tex. App.—Amarillo 2017).

This Court granted the State's petition for discretionary review and refused Appellant's cross-petition. Thus, the designated issue before the Court was: "Can the felonies of reckless or criminally negligent injury to a child or reckless or criminally negligent child endangerment underlie a felony-murder conviction when the act underlying the felony and the act clearly dangerous to human life are one and the same?"

³ The court also addressed several alternate grounds, including challenges to the admission of extraneous offenses and complaints of jury-charge error. *Fraser*, 523 S.W.3d at 336, 340. "Manslaughter was never defined in the charge and the application paragraph omitted the provision 'other than manslaughter' altogether." *Id.* at 326. The court of appeals also found that the trial court had erroneously submitted the full definition of recklessness to the jury, when only the result-oriented definition was relevant to this case. *Id.* at 341. The court of appeals failed to notice that the statutory language "and in furtherance of" was omitted entirely from the application paragraph, which rendered the charge presumptively erroneous. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015) ("[A] jury charge with an application paragraph that incorrectly applies the pertinent penal law to the facts of a given case is erroneous."). The court also did not address whether the cumulative effect of these possible jury-charge errors resulted in reversible error. Although it appears to me that there were significant errors in the charge under which Appellant was convicted, because these issues were not fully explored by the court of appeals and were not raised by either party in this Court, I do not address them here.

As discussed above, the Court chooses to address a much narrower issue despite the broad language of the issue granted for review. The Court's opinion focuses solely on whether the predicate felonies of injury to a child and child endangerment are lesser-included offenses of manslaughter. Answering that question in the negative, the Court reverses the court of appeals and upholds Appellant's felony-murder conviction.

DISCUSSION

The second half of the designated issue in this case calls for this Court to determine whether a felony-murder conviction would stand when the underlying felony and the act clearly dangerous to human life are one and the same. The Court does not directly answer that question in this case. It has answered that question "yes" in previous cases. I believe those other cases are wrong. In addressing my position, I start with a plain-language statutory analysis as it applies in this case.

- I. Under the plain language of the felony-murder statute, a single act cannot serve as both the underlying felony and the "act clearly dangerous to human life" committed "in the course of and in furtherance of" the underlying felony—the felony and the clearly-dangerous act must be separate.**

A person commits the offense of felony murder if she "commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, [s]he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual." TEX. PENAL CODE § 19.02(b)(3). The Legislature's use of the word "and" to separate the

felony from the act clearly dangerous to human life reflects its intent to require distinct proof as to each element; the felony and the dangerous act may not be one and the same. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 12, 116 (2002) (“Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives. . . . With a conjunctive list, all . . . things are required—while with the disjunctive list, at least one of the [things] is required, but any one . . . satisfies the requirement.”) (emphasis included in original); *see also Hall v. Hall*, 818 S.E.2d 838, 846-47 (W. Va. 2018) (“[T]he use of ‘and’. . . clearly makes both conditions necessary, not merely either of the two. . . . ‘And’ is a conjunction connecting words or phrases, expressing the idea that the latter is to be added to or taken along with the first.”) (internal citations omitted). Thus, the plain language of the statute requires both: (1) an underlying felony (or attempted felony) other than manslaughter; and (2) a separate act clearly dangerous to human life which is committed (or attempted) in the course of and in furtherance of the commission of (or in immediate flight from) that felony (or attempted felony) which causes the death of another. *Id.*

This understanding of the statutory language is further supported by the requirement that the dangerous act must be committed “in the course of *and in furtherance of*” or “in immediate flight from” the commission of the felony. TEX. PENAL CODE § 19.02(b)(3) (emphasis added). The word “furtherance” means “the act or process of facilitating the progress of something or of making it more likely to occur.”⁴ Given this meaning, how can

⁴ BLACK’S LAW DICTIONARY 790 (10th ed. 2014); *see also* WEBSTER’S NEW INTERNATIONAL DICTIONARY 924 (3d ed. 2002) (furtherance means “helping forward,” “advancement,” or

one commit an act that is in furtherance of itself? “In furtherance of” necessitates that the act be distinct from the underlying felony. Likewise, how can one commit an act “in immediate flight from” the felony that constitutes the same act? If one is in immediate flight from the felony, the felony is complete and the act occurs after the completion of the felony. As such, the felony and the dangerous act must be separate acts; the dangerous act cannot be completely subsumed within the felony’s elements.

In Fraser’s case, the State pled that Fraser committed the underlying felony (injury to a child or, alternatively, child endangerment) through a single act—giving or causing the baby to ingest diphenhydramine. By this pleading alone, the State could not meet the burden of proving a felony and a separate “clearly dangerous act” committed “in furtherance” of that felony. Because how can drugging a baby be “in furtherance of” drugging a baby? It is not “in furtherance of” the felony—it *is* the felony.

As shown below in Section II.E. of this opinion, the Court’s precedent interpreting the felony-murder statute has largely ignored both the Legislature’s use of “and” as well as its use of the “in furtherance of” or “in immediate flight from” language. In doing so, this Court has shirked its obligation to give effect to each word and phrase in a statute whenever possible. *Lang v. State*, 561 S.W.3d 174, 180 (Tex. Crim. App. 2018) (“In interpreting the literal text of a statute, we must ‘presume that every word . . . has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible.’”) (quoting *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997)). We

“promotion”).

need to adopt an approach that gives effect to the plain language enacted by the Legislature and prohibit the State from using the very same proof to establish both the underlying felony and the act clearly dangerous to human life. With this opinion, I urge this change.

A Note About the Statute's Manslaughter Exception

Some may question my interpretation based on the statute's inclusion of the manslaughter exception—i.e., why would the Legislature exempt manslaughter if it already required the felony to be separate from the act causing the death? There are well-recognized historical justifications for the inclusion of the manslaughter exception, and these justifications do not undermine my interpretation of the statutory language.

The manslaughter exception was included in the felony-murder statute as a carry-over from the historical felony-murder doctrine and to codify the felony-murder principles recognized by early scholars and jurists.⁵ Specifically, the manslaughter exemption codifies the principle that allowing manslaughter to serve as the predicate felony would permit “all manslaughters [to] automatically ride up an escalator to become felony-murders,” thereby eviscerating the homicidal grading schemes. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, 558-59 (1972).⁶

⁵ For example, 17th century scholar Michael Dalton recognized in his writings that not all accidental killings committed during an unlawful act amounted to felony murder, but rather constituted manslaughter. See Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 81 (2004) (citing Michael Dalton, THE COUNTRY JUSTICE 225 (corrected and enlarged ed. 1619)).

⁶ See also David Crump, Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 377-78 (1985) (noting most jurisdictions prohibit manslaughter from serving as the underlying felony and that “the use of homicidal felonies as predicates would destroy proportional grading by destroying these very felonies”); *Lawson v. State*, 64 S.W.3d 396, 398 (Tex. Crim. App. 2001) (Cochran, J., concurring) (“If involuntary manslaughter could form the basis of

As discussed in more detail below, the modern Texas Penal Code that went into effect in 1974 constituted the first major reform of the Penal Code since 1857. The drafting committee responsible for revamping the former Code stated that their objective was to “[c]onsolidate, simplify, and clarify the substantive law of crimes,” “[r]ationally grade offenses,” and “[c]odify the general principles of penal law.” State Bar Committee on Revision of the Penal Code, TEX. PENAL CODE, A PROPOSED REVISION (Final Draft, 1970) IV.

In its commentary of the felony-murder statute, the drafting committee recognized that the newly-worded statute was a “restatement of the [felony-murder] doctrine” that “will probably effect little change in practice.” *Id.* at 148. As detailed below, the common practice prior to the 1974 Texas Penal Code was to impose felony-murder liability in cases involving an inherently dangerous felony, such as robbery, accompanied by a separate dangerous act causing death. In codifying the felony-murder doctrine, the Legislature intended to preserve this practice rather than do away with it, and the manslaughter exemption language simply worked to prevent the bootstrapping of any accidental killing during an unlawful act into felony murder. It was a “belt and suspenders” inclusion.

Moreover, the interpretation I advance strictly construes the plain language of the statute even with the manslaughter exception. The Court’s interpretation does not. In fact, its interpretation even includes what it has admitted is a judicially created construct that is

a felony murder prosecution, each and every such recklessly caused death would constitute felony murder. The offense of involuntary manslaughter would be swallowed up by the felony murder rule.”).

not founded in the statutory language. *See Johnson*, 4 S.W.3d at 255 (“Despite the plain language, we have interpreted section 19.02(b)(3) as exempting from the felony murder rule not only manslaughter, but also lesser included offenses of manslaughter.”).

II. The history of felony murder in America, Texas, and in other states; the legislative history of our felony-murder statute; and the history of this Court’s felony-murder opinions provide perspective on and support for my suggested interpretation of Texas Penal Code Section 19.02(b)(3).

While I believe that our felony-murder statute is clear and unambiguous, other judges on the Court may have a different interpretation. Thus, I address extra-textual sources. Through the extra-textual sources and an examination of the Court’s inconsistent and ever-changing opinions, I hope to demonstrate that the Court should rethink its approach to felony-murder cases.

A. History of the felony-murder doctrine in the United States.

Many scholars and jurists have suggested that America inherited from England a “strict liability” form of felony murder (one that imposed first-degree murder liability for any death resulting from felonious conduct, even purely accidental deaths). But the historical analysis does not support that contention.

Research indicates that a strict-liability felony-murder rule was largely theoretical in English law and was never actually applied. Instead, the felony-murder doctrine was primarily developed in America through legislative enactments and judicial interpretations. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60-66 (2004) (“The first felony murder rules were enacted not in medieval England, but in

nineteenth-century America.”).⁷ American courts began applying felony-murder statutes in the 1840s to impose murder liability for unintended killings in the course of felonies. *Id.* at 65. These early rules were “almost always quite limited in scope.” *Id.*

By the mid-19th century, various states had enacted numerous laws criminalizing felonies, with penalties ranging from short prison terms to death. With such a developed body of law, “a rule holding all felons strictly liable as murderers for all deaths in the course of all felonies would have been inconsistent with the structure of American criminal codes.” *Id.* As such, felony murder was typically limited to underlying felonies that were inherently dangerous to life. *Id.*⁸ They also “usually required that felons kill their victims by intentionally battering them or by engaging in some destructive act manifestly dangerous to

⁷ Professor Binder notes that the scholars suggesting the doctrine originated in England do not identify any examples from case law of harsh applications of the rule, nor do these accounts manage to identify “when this supposed common law rule of strict liability for all deaths resulting from felonies became the law in England.” Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 63 (2004) (hereinafter referred to as “*Origins of American Felony Murder*”). Binder opines that the “harsh common law felony murder rule” in England is but a “myth,” and the “draconian doctrine of strict liability for all deaths resulting from all felonies was never enacted into English law or received into American law.” *Id.* Binder suggests that the English felony-murder rule emerged after the American rule. Thus, the English common law “was late in developing a felony murder rule, and never held felons strictly liable for causing death accidentally.” *Id.* at 64.

⁸ See also *Rodriguez v. State*, 953 S.W.2d 342, 346 (Tex. App.—Austin 1997) (“As the number of felonies multiplied so as to include a great number of relatively minor offenses, many of which involved no great danger to life or limb, it became necessary, in order to alleviate the harshness of the rule, to limit it in some fashion. . . . In the United States, limitations on the doctrine have varied from state to state and often have depended on differently worded statutes. Some states limit the rule to certain enumerated felonies, others to felonies that are inherently or foreseeably dangerous to human life, or where the homicide is a natural consequence of the felonious act. Some states require that the underlying felony be *malum in se* rather than *malum prohibitum*. Another limitation is that the underlying felony must be independent of the homicide.”).

life, such as deliberately wrecking a train.” *Id.* at 65-66.⁹ Most reported cases involved intentional inflictions of injury in the course of a felony (e.g., a shooting during a robbery, a stabbing during a burglary, a strangulation during a rape). *See id.* at 185-86. Often, such killings would have been classified as murder regardless, but were aggravated to first-degree felony murder because the death occurred in furtherance of a “particularly dangerous felony.” *Id.* at 66. Only a few cases involved an unintentional infliction of injury. But in those cases the acts were so dangerous that the defendants “at least should have been aware that they were subjecting others to a substantial risk of death, in violation of their rights, for the defendants’ own selfish ends.” *Id.* at 195. Early felony-murder rules in this country “certainly did not punish felons for accidental death” in the course of any felony. *Id.* at 68.¹⁰

By the end of the 19th century, all but eight American jurisdictions had legislation on the subject of homicide in the course of crime. *Id.* at 123. Some of these jurisdictions permitted felony-murder liability in the absence of a standalone felony-murder statute through judicial interpretation of their general murder statutes. *Id.* at 141, 160. Nineteen states, however, did enact specific felony-murder statutes.

⁹ See also Binder, *Origins of Felony Murder*, *supra* note 7, at 72 (noting that most early felony-murder prosecutions involved situations in which an “intentional battery or an act otherwise clearly dangerous to human life was performed in the course of a dangerous felony”).

¹⁰ In a treatise from 1875, it was noted that there was no reported modern conviction for murder “in a case in which there was no evidence of malicious intent towards the deceased, and in which the felonious intent proved was simply an intent to commit a collateral felony.” Francis Wharton, *A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES* 39 (2d ed. 1875). Thus, Wharton rejected “the old doctrine that a collateral felonious intent can be tacked to unintended homicide, so that a man who in stealing fowl accidentally kills the fowl’s owner, can be held guilty of murder.” *Id.* at iii-iv.

The earliest felony-murder statutes in America illustrated three different approaches to defining the offense: (1) predicated liability on express or implied malice as shown through the commission of a violent or dangerous act causing death, as well as the commission of a felony; (2) predicated liability on one of several enumerated felonies, all inherently dangerous, such as robbery, arson, burglary, or rape; or (3) predicated liability on any felony. *Id.* at 121, 175.

The first approach, requiring a showing of malice, was based on the principle that a person who engages in either an intentional act of violence or an inherently dangerous act likely to cause death during the commission of a felony demonstrates the requisite culpability to be held liable for murder. Illinois, California, and Texas, among other states, followed some form of this model. For example, in Illinois felony-murder liability required proof of an inherently violent or dangerous felony, as well as an act of violence committed during the course of that felony exhibiting a reckless disregard of a danger of death. *Id.* at 162, 185; *see* ILL. REV. CODE, CRIM. CODE, §§ 22, 24, 28 (1827) (criminalizing murder based on malice implied by circumstances showing “an abandoned and malignant heart.”).¹¹

¹¹ In the 1884 case of *Adams v. People*, the Illinois Supreme Court upheld a felony-murder conviction where the defendant robbed people at gunpoint on a train and then forced them to jump from the moving train, causing one of the victims to hit his head and die. 109 Ill. 444 (Ill. 1884). Explaining that there was sufficient proof of malice, the court stated:

It is sufficient that death or great bodily harm was the natural result Malice may be proved by evidence of gross recklessness of human life, where, in any manner, the life of another is knowingly, cruelly and grossly endangered, whether by actual violence, or by inhuman privation or exposure, and death is caused thereby. Malice may be inferred where an act unlawful in itself is done deliberately, and with intention of mischief or great bodily harm to those on whom it may chance to light, and death is occasioned by it.

The second approach, based on enumerated felonies, stemmed from the principle that if a person was engaged in an enumerated felony inherently dangerous to human life and his conduct resulted in a death, no further showing of culpability was required to elevate the offense to murder. The culpability was supplied by the intent to commit the dangerous felony that created an unjustifiable risk of death. Binder, *Origins of Felony Murder*, *supra* note 7, at 183. States utilizing this approach included Mississippi (after 1857 enumerated felonies included rape, burglary, arson, and robbery),¹² New Jersey (enumerated felonies included sodomy, rape, burglary, robbery, and arson, or “any other unlawful act . . . of which the probable consequence shall be bloodshed”),¹³ and Alabama (same as Mississippi).¹⁴ *Id.* at 182. Notably, by limiting the underlying felonies to only these enumerated violent offenses, this approach also prevented the problem of merger, discussed *infra*, and necessarily “impose[d] a requirement of independent felonious purpose, as these [offenses] all involve aims distinct from simply injuring or endangering the victim.” *Id.* at 191.

Id. at 449-50 (internal citations omitted).

¹² MISS. REV. CODE Ch. 64, art. 165 (1857).

¹³ Act of Feb. 17, 1829, § 66, 1828-1829 N.J. Laws 109, 128.

¹⁴ Ala. Crim. Code of 1876, § 4295; *Kilgore v. State*, 74 Ala. 1, 8 (Ala. 1883) (“The criminal intent, which is involved in the attempt to commit either of these felonies, gives complexion to, and determines the character of the killing which may be consequent. It supplies the place of ‘malice aforethought’ of the common law, the essential and distinguishing characteristic of murder, and of the specific intent to take life, or the ‘willful, deliberate, malicious and premeditated killing,’ which is the element of one class of homicides the statute denounces and punishes as murder in the first degree.”).

Finally, the third approach permitted felony-murder liability for an unintentional killing committed during the course of any felony. Jurisdictions following this approach included New York, Mississippi (pre-1857), Missouri,¹⁵ and Oregon. *Id.* at 171. Despite the seemingly broad nature of such statutes, courts engrafted limitations on the rule. One such limitation was the “merger limitation,” which required that the underlying felony have some purpose independent of the victim’s death or serious injury. *Id.* at 173.¹⁶ Other limitations included requiring proof of an intentional battery,¹⁷ or that predicate felonies be dangerous

¹⁵ Missouri, however, later restricted first-degree felony murder to murders in the course of arson, burglary, rape, robbery, and mayhem. MO. REV. STAT. § 1232 (1879).

¹⁶ For example, in New York, the law enacted in 1829 permitted conviction for felony murder for any killing “perpetrated without any design to effect death, by a person engaged in the commission of any felony.” N.Y. REV. STAT. Pt. 4, ch. 1, tit. 1, § 5 (1829). But New York courts held that purely assaultive conduct, in the absence of some other felonious motive, could not give rise to liability for felony murder because the assault and the killing merged. *See, e.g., People v. Rector*, 19 Wend. 569, 593 (N.Y. 1838). Missouri similarly adopted a merger rule in 1878. *See State v. Shock*, 68 Mo. 552 (Mo. 1878) (rejecting felony-murder conviction for killing of child through beating). The Missouri Supreme Court explained,

[T]he words “other felony” used in the first section refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an offense distinct from the homicide.

Id. at 561-62. The merger principle continues to operate as a limitation on the felony-murder doctrine in many jurisdictions today and is discussed in greater detail *infra* in Section II.D. of this opinion.

¹⁷ *See People v. Deacons*, 16 N.E. 676 (N.Y. 1888) (predicate felony was unauthorized entry by a “tramp,” and act causing death was intentional beating and strangling); *People v. Johnson*, 17 N.E. 684 (N.Y. 1888) (predicate felony was escape from custody, and act causing death was clubbing with iron bar); *Buel v. People*, 78 N.Y. 492 (1879) (predicate felony was rape, and act causing death was strangling).

to human life.¹⁸ *Id.* at 189. Some states imposed only third-degree-felony punishment under this broader definition of felony murder, and thus did not impose first-degree felony-murder liability for deaths caused during the course of any felony.¹⁹

B. Texas's early approach to felony murder.

Texas “was the felony murder center of America during the 19th century, with about one-fourth of all the reported felony murder convictions in the country.” Binder, *Origins of Felony Murder*, at 167. Although Texas’s statute (under the 1857 Texas Penal Code) was the most frequently applied, it was also “the most narrowly applied” because it required a showing of malice, either express or implied. *Id.* at 185.²⁰ The 1857 Code also included a grading scheme, which elevated a killing to first-degree murder when committed with “express malice” or when committed in the perpetration or attempt of enumerated felonies.²¹

¹⁸ See, e.g., *State v. Earnest*, 70 Mo. 520 (1879) (killing of victim in course of robbery); *State v. Hopkirk*, 84 Mo. 278 (1884) (same).

¹⁹ These jurisdictions included Wisconsin, Florida, and Minnesota. See Binder, *Origins of Felony Murder*, *supra* note 7.

²⁰ The 1857 Texas Penal Code provided that “[e]very person with a sound memory and discretion, who shall unlawfully kill any reasonable creature in being within this State, with malice aforethought, either express or implied, shall be deemed guilty of murder.” Act of Feb. 12, 1858, ch. 121, pt 1, tit. 17, ch. 15, 1857-58 Tex. Laws 156, 173.

²¹ *Id.* (“All murder committed by poison, starving, torture, or with express malice, or committed in the perpetration, or in the attempt at the perpetration of arson, rape, robbery, or burglary, is murder in the first degree, and all murder not of the first degree is murder of the second degree.”). This Court soon clarified, however, that liability for felony murder was not limited to only those enumerated felonies; rather, in situations involving express or implied malice, even non-enumerated felonies could support liability for felony murder. See *Richards v. State*, 30 S.W. 805, 806 (Tex. Crim. App. 1895) (noting that, regardless of whether felony was enumerated, it was a “well-settled” rule that “where a party is attempting to commit a felony, kills another, whether by accident or intention, with malice aforethought, nothing less than murder could be the result”). Although *Richards* addressed the concept of felony murder, it was in fact a transferred-intent case involving

“[M]alice was an independent constraint on felony murder liability,” which required *both* “a dangerous felony and an act of violence or extreme recklessness.” Binder, *Origins of Felony Murder*, *supra* note 7, at 185.

Express malice was defined as the deliberate intent to seriously harm or kill a particular person, whereas implied malice involved the transferring of malicious intent to an unintended victim or injury. *McCoy v. State*, 25 Tex. 33 (1860). Proof of malice was a requirement for all murder convictions. *Id.* at 39-41. In *McCoy*, the Texas Supreme Court made clear that liability for felony murder could not arise from any and all accidental killings in the course of a felony. Instead, such liability was generally predicated on the intentional infliction of a serious injury on some intended victim under circumstances where the harm was not the primary objective of the criminal enterprise. *Id.* at 39-41; *see also* Binder, *Origins of Felony Murder*, *supra* note 7, at 168. Thus, liability for felony murder through an “implied malice” theory would lie only for situations involving violent conduct or acts presenting a great and foreseeable risk of injury during the course of some distinct felony. Binder, *Origins of Felony Murder*, *supra* note 7, at 169.

Cases following *McCoy* continued to stress the importance of proof of malice. *See, e.g., Hedrick v. State*, 51 S.W. 252 (Tex. Crim. App. 1899) (holding that only killings with malice done in perpetration of a felony would warrant first-degree felony murder liability); *Pharr v. State*, 7 Tex. Ct. App. 472 (Tex. Ct. App. 1879) (overturning a felony-murder

an intentional shooting that resulted in the death of an unintended victim.

conviction because the jury was not charged on malice, “the indispensable requisite in all murder”). These cases reflect that, under early Texas law, felony murder had restrictions and always required proof of malice. Given these limitations, during this time period there were “no felony murder convictions predicated on nondangerous felonies,” and “almost all of the cases involved deliberate infliction of violence” during the course of a felony. Binder, *supra* note 7, at 170.²²

The foregoing analysis of the history of felony murder in America and Texas demonstrates that early felony-murder rules throughout the country were limited in scope. They largely targeted intentional acts of violence or acts that were so obviously dangerous in nature that they presented a high probability of death. Given the narrow scope of early felony-murder rules, modern felony-murder statutes “should not be seen as incorporating by reference a common law felony murder rule that never existed,” and “should not be presumed to impose strict liability for all deaths caused in the course of all felonies.” Binder, *Origins of Felony Murder*, *supra* note 7, at 69.

²² The vast majority of early Texas felony-murder cases involved violent killings during robberies. See, e.g., *Singleton v. State*, 1 Tex. Ct. App. 501 (1877) (defendant engaged in robbery slashed victim’s throat and shot him in the head); *Gonzales v. State*, 19 Tex. Ct. App. 394 (1885) (defendant bound his robbery victim and shot him in the head); *Mendez v. State*, 16 S.W. 766 (Tex. Ct. App. 1891) (defendant shot two robbery victims repeatedly); *Wilkins v. State*, 34 S.W. 627 (Tex. Crim. App. 1896) (defendant shot robbery victim multiple times). In *Stanley v. State*, the defendant killed his victim with an axe during a robbery. 14 Tex. Ct. App. 315 (1883). In *Washington v. State*, the defendant slashed the victim’s throat during a rape. 8 S.W. 642 (Tex. Ct. App. 1888). In *Cook v. State*, the defendant strangled his rape victim. 18 S.W. 412 (Tex. Ct. App. 1892). In several cases, defendants were held liable for felony murder in the absence of any direct evidence of intent to injure or kill. But in those cases, the facts involved dangerous acts committed in the course of a felony that were highly likely to result in death. For example, in *Williams v. State*, a group of train robbers deliberately wrecked a train, resulting in loss of life. 17 S.W. 408 (Tex. Ct. App. 1891).

It is against this historical backdrop that I next consider the legislative history for the modern version of the Texas felony-murder statute, which sets forth the statutory language relevant to this case.²³

C. Texas legislative history of the current felony-murder statute.

The legislative history of Penal Code Section 19.02(b)(3) provides insight into the intent and purpose underlying the statute. The statute was not designed to encompass homicides where the act clearly dangerous to human life resulting in death is wholly subsumed by the underlying felony. Neither was it designed for a strict-liability application of murder. The statute's preliminary drafts and commentaries show that the primary author of the statute built in limitations to avoid an overly-broad application of felony murder.

Our current Texas Penal Code was drafted and compiled in the late 1960s and early 1970s by the Governor's State Bar Committee on Revision of the Penal Code ("the Committee"). Headed by Dean Page Keeton, the Committee was comprised of judges,

²³ Between the turn of the century and the enactment of the 1974 Texas Penal Code, there were few significant developments in the law of felony murder in this state. With the exception of minor wording and punctuation alterations and renumbering of the relevant articles, the statutes remained the same throughout most of the 20th century until 1974. *See* TEX. PENAL CODE 1911 art. 48; TEX. PENAL CODE 1925 art. 42. During that time, Texas courts, including this Court, continued to affirm convictions under the statute where the underlying felony was inherently dangerous and the facts of the killing were adequate to prove express or implied malice. *See, e.g., Cobb v. State*, 386 S.W.2d 811 (Tex. Crim. App. 1965) (upholding a felony-murder conviction where the predicate felony was robbery and resulted from stab wounds from a butcher knife); *Cook v. State*, 211 S.W.2d 224 (Tex. Crim. App. 1948) (upholding a felony-murder conviction where the predicate felony was robbery of a poker game and death resulted from a gunshot); *Dickson v. State*, 463 S.W.2d 20 (Tex. Crim. App. 1971) (upholding a felony-murder conviction where the predicate felony was robbery of a cab driver and death resulted from a gunshot).

lawyers, professors, and various legal or law enforcement groups from across the state.²⁴ Formally proposed by the Committee in 1970, enacted by the Texas Legislature in 1973, and effective in 1974,²⁵ the new Texas Penal Code constituted the first major reform of Texas criminal laws since they were codified in the 1857 Penal Code.²⁶

Chapter 19, the Texas Penal Code’s homicide chapter, was drafted by Committee member Frank Maloney, who later served as a judge on this Court from 1991-1996. In a preliminary draft of Chapter 19, Maloney proposed a felony-murder statute substantially similar to the current version:

(1) [A] person is guilty of murder if by his conduct he . . . (c) commits or attempts to commit a forcible felony and in the course of and in furtherance of the felony or in immediate flight therefrom he commits or threatens to commit an act inherently dangerous to human life which causes the death of another.²⁷

In the draft’s commentary, Maloney noted that Subdivision (c) “includes those cases where the actor commits a type of felony that involves substantial risk to human life” and in addition to the felony, “*it must further be shown that the actor committed or threatened an act that was inherently dangerous to human life.*”²⁸

²⁴ State Bar Committee on Revision of the Penal Code, TEX. PENAL CODE, A PROPOSED REVISION (Final Draft, 1970) III, XI-XIII (hereinafter referred to as “FINAL DRAFT”).

²⁵ Act of May 24, 1973, ch. 399, 1973 Tex. Gen. Laws (codified as TEX. PENAL CODE (Vernon 1974)).

²⁶ FINAL DRAFT, *supra* note 24, at III.

²⁷ Frank Maloney, State Bar of Texas Committee on Revision of the Penal Code, 1967 PRELIMINARY DRAFT: CRIMINAL HOMICIDE 2 (October 20, 1967) (hereinafter referred to as “PRELIMINARY DRAFT”). “Forcible felony means any felony, except manslaughter or negligent homicide, which involves the use or threat of physical force or violence against another.” *Id.* at 1.

²⁸ *Id.* at 8.

Maloney's handwritten notes, shown below, were produced during the drafting process and include in the margins next to the proposed felony-murder statute the following annotation: "fel & act dang to human life."²⁹ The "and" sign between "fel. & act . . . " indicates that Maloney intended that the two events—the underlying felony and the act clearly dangerous to human life—be distinct. Maloney's notes also identified the Texas felony-murder rule as "Restricted Felony Murder," indicating that a strict-liability application was never intended; the statute contains limitations.

Both Maloney's commentary and handwritten notes are consistent with the plain language of Section 19.02(b)(3), which mandates that in addition to an underlying felony, there must be a distinct act clearly dangerous to human life committed in the course of and in furtherance of the felony that causes death.

²⁹ Frank Maloney Papers, 1960-1974, Box 4, Folder 6, Tarlton Law Library, Jamail Center for Legal Research.

Murder

1902

Murder

-

Cap. felony

- death penalty

1-12 to life

1-10 to 30

applicable to those ~~cases~~

18+ over act of act

otherwise fel 1st deg. -

Unless killing on legal provocation - see 19.02(a)(2)
(Manslaughter)

Intentional

person commits murder, if:

(1) intent causes death of another -

(i.e. he acts w/a conscious desire + objective to kill —)

Knowingly

(2) knowing causes death of another(i.e. he is aware that his conduct is practically certain to cause the ~~result~~ death of another.)Intends
Serious
bodily
harm(3) he intends to cause serious bodily injury + commits an act clearly dangerous to human life that causes the death of another(i.e. intent (conscious desire to cause serious bodily injury + a act dangerous to human life which ^(act) causes the death of another)21+3
Requires
actClearly
dangerous
to human
life.fel + act
dangerous
to human life(3) Restricted (felony) doctrine -

he commits or attempts to commit a felony. [other than murder or crim. negl. hom.] + in the course thereof or in flight he commits or attempts to commit act clearly dangerous to human life ~~that~~ which (act) causes death of another. -

Maloney's commentaries also demonstrate that the felony-murder statute was designed to punish only those who, at a minimum, engaged in inherently dangerous conduct that is highly likely to cause, and in fact does cause, death. In the preliminary draft commentary, Maloney explained that "[t]he proposed Texas draft is designed to accomplish the same ends as the [Model Penal Code]" felony-murder statute, and that:

The M.P.C. murder provision is based on the premise that no one should be guilty of murder unless either death was intended or the actor's conduct was of such a nature as to create a high degree of probability of death and the homicide was committed under circumstances indicating extreme indifference to the value of human life. The M.P.C. language is an attempt to differentiate between two types of recklessness: (1) recklessness that is something close to knowledge that death will result, and (2) recklessness that involves a substantial homicidal risk.³⁰

The former type of recklessness warranted a murder charge, Maloney explained, while the latter type reached only manslaughter.³¹ Under this understanding, the felony-murder statute was designed to punish an actor who is aware that death is a highly probable result of her conduct.

³⁰ PRELIMINARY DRAFT, *supra* note 27, at 7-8 (emphasis included). The Model Penal Code felony-murder statute then read:

(1) [C]riminal homicide constitutes murder when . . . (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape.

Id. at 7.

³¹ *Id.*

The preliminary draft of Chapter 19, including the commentaries, was presented by Maloney at a Committee meeting in November 1967.³² During the meeting, the Committee amended the statute to read “an act *clearly* dangerous to human life” rather than “*inherently* dangerous.”³³ In discussing the change, the Committee considered alternatives such as “his conduct is dangerous to human life.” This was rejected based on the concern that it “would lead to second guessing because the conduct might not have been foreseeably dangerous to human life.”³⁴ In searching for a “test for telling whether or not the killer knew ahead of time that his conduct would cause a death or would be likely to cause death,” the Committee settled on “an act clearly dangerous to human life.”³⁵

Commentary from the 1970 Final Draft of the Texas Penal Code—which was adopted by the Legislature with minor, non-substantive changes to the felony-murder statute³⁶—further clarifies the conduct that the drafters intended the felony-murder statute

³² Committee on Revision of the Penal Code, Summary of Meeting Minutes (Nov. 3, 1967).

³³ *Id.* at 30-31 (emphasis added). This change was made during the discussion of the serious bodily injury murder statute, but applies equally to the felony-murder statute as both statutes originally read “act inherently dangerous to human life,” and both were amended to read, and still do read, “act clearly dangerous to human life.” *Id.*; TEX. PENAL CODE § 19.02(b).

³⁴ Committee on Revision of the Penal Code, Summary of Meeting Minutes 30-31 (Nov. 3, 1967).

³⁵ *Id.* at 31.

³⁶ The felony-murder statute from the 1970 Final Draft read that a person commits murder if:

[H]e commits or attempts to commit a felony, other than manslaughter or *criminally negligent homicide*, and in the course of and in furtherance *of the felony*, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of another.

to reach and punish:

Although it may contract the scope of the [former Texas]³⁷ felony murder doctrine, the chief aim of Section 19.02(a)(3) is clarification. *Under it the mere attempt or commission of a felony no longer suffices to imply intent or knowledge: the actor must kill while attempting or committing an act clearly dangerous to human life in the course or furtherance of the felony or in immediate flight therefrom.* As most felony murder prosecutions today involve killings committed while the felon is engaged in highly dangerous conduct, however, Section(a)(3)'s restatement of the doctrine will probably have little change in practice.³⁸

With this commentary, the drafters highlighted their intent that not all deaths arising from the commission of a felony equate to felony murder. Rather, to rise to the level of felony murder, more was needed: an act clearly dangerous to human life committed in the course of and in furtherance of the felony. While the Final Draft commentary uses “in the

FINAL DRAFT, *supra* note 24, at 146. The felony-murder statute enacted in 1973 read that a person commits murder if he

commits or attempts to commit a felony, other than *voluntary or involuntary* manslaughter, and in the course of and in furtherance *of the commission or attempt*, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Act of May 24, 1973, ch. 399, 1973 Tex. Gen. Laws (codified as TEX. PENAL CODE (Vernon 1974)) (emphasis added to show difference between the two versions).

³⁷ Prior to 1973, felony murder prosecutions were based on Article 42 of the General Provisions of the Texas Penal Code, which stated,

Act done by mistake a felony—One intending to commit a felony and who in the act of preparing for or executing the same shall through mistake or accident do another act which, if voluntarily done, would be a felony, shall receive the punishment affixed to the felony actually committed.

Act of 1925, 39, R.S., § 1, art. 42. Gen. Laws 1, 9 (repealed 1973).

³⁸ FINAL DRAFT, *supra* note 24, at 148 (emphasis added).

course *or* furtherance of,” it is significant that the final proposed and ultimately enacted statute contains the phrase “in the course of *and* in furtherance of”—a clear indication that the Committee and the Legislature intended that the dangerous act be both in the course of *and* in furtherance of a separate felony, as opposed to merely one or the other.³⁹

In sum, the legislative history and draft commentary reveal that the legislative intent in enacting Texas Penal Code Section 19.02(b)(3) was that a finding of felony murder requires proof that: (1) a felony is committed or attempted; (2) separate and distinct from the felonious conduct, the actor commits an act clearly dangerous to human life; (3) the dangerous act is committed in the course of and in furtherance of the felony, or in immediate flight therefrom; and (4) the dangerous act causes the death of an individual. The changes made to the proposed felony-murder statute, and the discussions surrounding those changes, further emphasize that the intention behind the statute was to create first-degree murder liability for an actor who is engaged in a felony and, while doing so, commits a discrete act that she knows will likely result in death. That the conduct is dangerous is not enough. The danger involved must create a high probability of death, and the likelihood of death resulting must be foreseeable.

D. How the high courts of other states interpret felony-murder statutes similar to ours.⁴⁰

³⁹ See Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 12, at 116 (2002).

⁴⁰ With this section, I am not suggesting that this Court adopt another state’s interpretation of felony murder. I advocate for a strict, plain-language interpretation of Texas Penal Code’s Section 19.02(b)(3). I do, however, believe that examining other states’ interpretations and applications of their respective felony-murder statutes may assist this Court given this Court’s inconsistent

With the exception of Hawaii, Kentucky, and Michigan,⁴¹ every American jurisdiction has a felony-murder statute in effect. The language, interpretation, and application of those statutes also varies from state to state. Most states place restrictions or limitations on the application of felony murder to prevent overly-harsh or unjust outcomes. The most common of these limitations, and one that is employed by forty-one states, is enumerating the predicate felonies within the statute. Other states restrict the application of felony murder through the merger doctrine, also known as the “independent-act doctrine,” which prohibits felony-murder convictions where the underlying felony and the act causing death are the same. A number of states apply foreseeability or proximate-cause standards.

Texas is one of seven states with a felony-murder statute that allows for any felony to serve as a predicate to the offense.⁴² Yet, the felony-murder statute in each of these seven states still contains legislative restrictions to avoid imposing strict liability for all accidental deaths associated with the commission of a felony.

1. How other states interpret the “in the course of and in furtherance of” language.

interpretations of our felony-murder statute.

⁴¹ Hawaii and Kentucky have legislatively abolished felony murder. HAW. REV. STAT. ANN. § 707-701 cmt.; KY. REV. STAT. ANN. § 507.020 cmt. (1974). Michigan has judicially abolished felony murder by requiring proof of an intent to kill or cause serious bodily injury. *People v. Aaron*, 299 N.W.2d 304, 328-29 (Mich. 1980).

⁴² The other six states are Delaware, DEL. CODE ANN. TIT. 11, § 636; Georgia, GA. CODE ANN. § 16-5-1; Minnesota, MINN. STAT. ANN. § 609.19; Missouri, MO. ANN. STAT. § 565.021; New Mexico, N.M. STAT. ANN. § 30-2-1; and South Carolina, S.C. CODE ANN. § 16-3-10.

While no other state's felony-murder statute contains the exact language of the Texas felony-murder statute, many other states use some of the same restrictive phrases found in Section 19.02(b)(3). This includes several states that have enacted statutes using the "in the course of and in furtherance of" language found in Section 19.02(b)(3). In some of these states, including Arkansas and Delaware, the high court has interpreted the phrase "in furtherance of" to require that the killing facilitate or advance the underlying felony. Before being amended in 2003,⁴³ Delaware's felony-murder statute required that the death occur "in the course of and in furtherance of" the commission of the felony, while the Texas statute requires that the act clearly dangerous to human life be committed "in the course of and in furtherance of" the felony. Despite these differences in wording, the interpretation of the "in furtherance of" language in both statutes should be the same. Delaware's Supreme Court interprets the phrase "in furtherance of" to mean that the death must "move forward" or "advance" the felony.

⁴³ Prior to 2003, the Delaware first-degree felony-murder statute stated: "A person is guilty of murder in the first degree when . . . [i]n the course of and in furtherance of the commission or attempted commission of a felony . . . , the person recklessly causes the death of another person." Act of July 6, 1972, ch. 497, § 1, sections 635, 636 (amended 2003).

In 2003, the Delaware Legislature amended its felony-murder statutes (the first-degree and second-degree felony-murder statutes are the same except that the latter includes a mental state of criminal negligence rather than recklessness) by removing the "in the course of and in furtherance of" language. DEL. CODE ANN. tit. 11, §§ 635, 636. The first-degree felony-murder statute now reads:

A person is guilty of murder in the first degree when. . . . While engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person.

In *Williams v. State*, the Delaware Supreme Court reversed a felony-murder conviction because the resulting death was not “in furtherance of” the commission of the underlying felony of burglary with intent to commit murder. 818 A.2d 906, 907-08 (Del. 2002), *superseded by statute*, DEL. CODE ANN. TIT. 11, §§ 635, 636 (2003). The court found that Williams’ purpose in committing the burglary was to kill his victim, not to “carry out the commission of the burglary.” *Id.* at 913. The court explained, “Had his purpose been to steal jewelry and [the complainant] was killed to facilitate his thievery, a case for felony murder would exist” because “the [statutory] language requires not only that the defendant, or his accomplices, if any, commit the killing but *also that the murder helps to move the felony forward.*” *Id.* (emphasis added). Because the sole purpose of the burglary was to murder the victim, the court held that the murder, “although ‘in the course of’ the burglary, was not carried out ‘in furtherance’ of it,” and thus felony murder was inapplicable. *Id.*

The Arkansas felony-murder statute also uses the phrase “in the course of and in furtherance of.” Under the Arkansas statute, a person commits felony murder if he commits or attempts to commit an enumerated felony (for capital felony murder) or any felony (for first-degree felony murder) “and . . . [*i*]n the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of a person under circumstances manifesting extreme indifference to the value of human life.” ARK. CODE ANN. §§ 5-10-101, 5-10-102 (emphasis added). Similar to the Delaware Court, the Supreme Court of Arkansas interprets “in the course of and in furtherance of” to mean that the killing must facilitate the commission or attempted commission of the underlying felony.

See Parker v. State, 731 S.W.2d 756, 759 (Ark. 1987); *Sellers v. State*, 749 S.W.2d 669, 671 (Ark. 1988).

In *Parker*, similar to the situation in *Williams, supra*, the court considered a felony-murder conviction where the underlying felony was burglary with intent to murder. *Parker*, 731 S.W.2d at 757. The appellant in *Parker* chased his victims into their home where he shot them to death. *Id.* at 758. In reversing the felony-murder conviction, the court held:

For the phrase “in the course of and in furtherance of the felony” to have any meaning, the burglary must have an independent objective which the murder facilitates. In this instance, the burglary and murder have the same objective. That objective, the intent to kill, is what makes the underlying act of entry into the home a burglary. The burglary was actually no more than one step toward the commission of the murder and was not to facilitate the murder.

Id. at 759. Thus, like Delaware, Arkansas also has strictly construed this phrase by requiring that, to support a felony-murder conviction, the death must be committed to advance or facilitate the underlying felony.

In *People v. Medina*, a Colorado appellate court contrasted the use of the phrase “in the course of *or* in furtherance of” in its felony-murder statute with other states’ felony-murder statutes requiring that the death be “in the course of *and* in furtherance of” the felony. 260 P.3d 42, 46 (Colo. App. 2010). In *Medina*, the appellant argued that his felony-murder conviction could not be predicated on burglary with intent to commit assault because the assault would not be “in furtherance of” the burglary. *Id.* at 45. In rejecting his argument, the court stressed that, whereas other states’ statutes contained the phrase “in the course of

and in furtherance of,” the Colorado statute contains “or,” thereby allowing burglary with intent to commit assault to serve as a predicate felony. *Id.* at 46. The court stated:

[Other states’] statutes required that death occur *both* in the course of and in furtherance of the burglary. In contrast, our statute is phrased disjunctively to cover deaths occurring “in the course of or in furtherance of” a burglary.

Id. (emphasis included in original).

These cases illustrate that other states’ high appellate courts strictly construe the “in the course of and in furtherance” phrase of their felony-murder statutes, thereby giving full effect to the statutory language. These courts find that the phrase “in furtherance of” requires proof of advancement or promotion of a distinct underlying felony. Thus, there must be some independent purpose of the underlying felony that may be advanced or promoted by the act causing death. Our felony-murder statute also contains the phrase “in the course of and in furtherance of,” and we should also give full effect to the Legislature’s chosen words.

2. States applying the merger doctrine.

Some states limit the application of the felony-murder rule by using the merger doctrine. In these states, “the felony-murder rule cannot be applied if the underlying felony is an offense that is an ‘integral part’ or is ‘included in fact’ in the homicide.” *People v. Davis*, 821 N.E.2d 1154, 1167 (Ill. 2004) (Garman, J., concurring). Under the merger doctrine, the underlying felony must have an independent felonious purpose from the act causing death.⁴⁴ This “ensur[es] that persons convicted of felony murder are sufficiently

⁴⁴ See, e.g., *State v. Marquez*, 376 P.3d 815, 823 (N. M. 2016) (“[A] dangerous felony may only serve as a predicate to felony murder when the elements of any form of the predicate felony—looked at in the abstract—require a felonious purpose independent from the purpose of endangering the

culpable to deserve murder liability.” Guyora Binder, *Making the Best of Felony Murder*, 91 B.U.L.REV. 403, 550 (2011). The merger doctrine prevents prosecutors from bootstrapping every reckless or criminally negligent killing into first-degree murder merely by proving the death was caused by a felonious assault.

In Texas, the plain language of Section 19.02(b)(3) provides the effect of the merger doctrine by requiring that the felonious conduct be separate and distinct from the dangerous act causing death. As discussed in Section II.E., *infra*, this Court previously used the phrase “merger doctrine” and applied it for several years, but then expressly abandoned it contrary to the statutory language. A review of the merger doctrine underscores the importance of giving effect to our statutory language.

The doctrine emerged and evolved in New York courts during the nineteenth century. Binder, *Making the Best of Felony Murder*, at 525-27.⁴⁵ In 1927, then-Chief Judge Cardozo explained why the merger doctrine required reversal of a felony-murder conviction predicated on a felonious assault:

Homicide is murder in the first degree when perpetrated with a deliberate and premeditated design to kill, or, without such design, while engaged in the commission of a felony. To make the quality of the intent indifferent, it is not enough to show that the homicide was felonious, or that there was a felonious assault which culminated in homicide *The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e.g., robbery or larceny or burglary or rape.*

physical health of the victim.”); *People v. Davison*, 923 N.E.2d 781, 788 (Ill. 2010) (“[T]his court has consistently recognized that the predicate felony underlying a charge of felony murder must have an independent felonious purpose.”)

⁴⁵ See also, e.g., *People v. Rector*, 19 Wend. 569 (N.Y. 1838).

People v. Moran, 158 N.E. 35, 36 (N.Y. 1927) (emphasis added). The appellant in *Moran* was a passenger in a vehicle stopped by two police officers. *Id.* at 36. The appellant shot one of the officers, then shot the second officer, killing both. *Id.* The jury received a felony-murder instruction based on the killing of the second officer. *Id.* at 37. The New York Court of Appeals noted that the appellant could have been prosecuted for premeditated and deliberate murder, but reasoned that the felony-murder conviction could not stand because the assault on the second officer “was not independent of the homicide. It was the homicide itself.” *Id.* at 103.

Chief Judge Cardozo distinguished the facts of *Moran* from the court’s decision in *People v. Wagner*, which upheld a felony-murder conviction involving an intentional shooting. *Id.* (citing *People v. Wagner*, 156 N.E. 644 (N.Y. 1927)). In *Wagner*, the appellant was assaulting a woman when her father came to her aid. *Wagner*, 156 N.E. at 645. The appellant shot and killed the father during the attempted rescue. *Id.* Judge Cardozo explained that the felony-murder conviction was appropriate under those facts because “[the father], a stranger to the fight” between the daughter and appellant, “plunged into it while it was yet in progress, to stay the commission of a felony upon the person of another.” *Moran*, 158 N.E. at 37. Thus, the assault on the woman provided an independent felonious purpose from the killing of the father, and the two distinct events did not merge.

In a more recent decision, the Iowa Supreme Court in *State v. Heemstra* reversed a felony-murder conviction where the predicate felony and the act causing death were entirely one and the same. 721 N.W.2d 549 (Iowa 2006). In *Heemstra*, the jury was instructed it

could convict the defendant—who shot and killed the victim—of felony murder⁴⁶ based on the predicate felony of willful injury. *Id.* at 553. The court recognized that in some circumstances, willful injury could serve as the predicate to felony murder, but not where the felony and the act causing death were the same. The court explained:

If the defendant assaulted the victim twice, first without killing and second with fatal results, the former could be considered as a predicate felony, but the second could not because it would be merged with the murder. *Otherwise, all assaults that immediately precede a killing would bootstrap the killing into first-degree murder[.]*

Id. at 557 (internal citation omitted) (emphasis added). The court further concluded that “if the act causing willful injury is the same act that causes the victim’s death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes.” *Id.* at 558.

The Iowa Supreme Court provided further clarity of its “independent-act requirement” in *State v. Tribble*, 790 N.W.2d 121, 123 (Iowa 2010). In *Tribble*, the victim sustained blunt-force trauma to her head and face before dying from asphyxiation. *Id.* at 123. On appeal, Tribble argued that he was not guilty of felony murder because the act of asphyxia and the infliction of blunt-force trauma were all part of a single assault. *Id.* at 124. The appellate court rejected that argument, finding that the initial head injuries were caused by an assaultive act that was separate from the act that caused the victim’s death, namely, asphyxiation. *Id.* “Thus, separate, independent acts were identified by the evidence.” *Id.* at

⁴⁶ In Iowa, the felony murder statute states that the offense is committed when a person kills “while participating in a forcible felony,” which is defined by another statute and includes the felony offense of willful injury. Iowa Code §§ 707.2; 702.11.

129. Looking to the purpose of the merger doctrine in reaching its decision, the court explained that “if the assault that serves as an element in the commission of the predicate felony under the felony-murder doctrine could also be the act that kills another person, every such assaultive felony that causes death would be murder.” *Id.* at 128.

The Maryland Court of Appeals—Maryland’s high court—recently adopted the merger doctrine. *State v. Jones*, 155 A.3d 492, 501 (Md. 2017). The court recognized that by previously rejecting the merger doctrine, it had improperly expanded the felony-murder rule. *Id.* at 507. It determined that the merger doctrine was necessary “to maintain the integrity of the different levels of culpability of murder and manslaughter.” *Id.* at 508. The court further concluded, “Where the only felony committed (apart from the murder itself) was the assault upon the victim that resulted in the death of the victim, the assault merges with the killing and cannot be the predicate for felony murder nor relied upon by the State as an ingredient of a felony murder.” *Id.*

Massachusetts also applies the merger doctrine. The Massachusetts Supreme Judicial Court explained its rationale behind the doctrine in a case upholding a felony-murder conviction where the underlying felony was kidnapping:

The merger doctrine functions as a constraint on the application of the felony-murder rule by limiting the circumstances in which a felony may serve as the predicate for felony-murder. Specifically, the doctrine requires the Commonwealth to prove that the defendant committed or attempted to commit a felony that is independent of the act necessary for the killing. This requirement ensures that not every assault that results in a death may serve as the predicate for felony-murder. Without the merger doctrine, the distinction between murder and other homicides would be rendered meaningless because all homicides could be enhanced to murder on the theory of felony-murder

with the assaultive conduct preceding the homicide serving as the predicate felony.

Commonwealth v. Fredette, 101 N.E.3d 277, 284 (Mass. 2018) (internal citations omitted).

Of particular relevance to this case, in a decision involving aggravated battery to a child that caused the child's death, the Illinois Supreme Court affirmed the reversal of a felony-murder conviction and concluded that "the predicate felony underlying a charge of felony murder must involve conduct with a felonious purpose other than the killing itself." *People v. Pelt*, 800 N.E.2d 1193, 1197 (Ill. 2003) (citing *People v. Morgan*, 758 N.E.2d 813, 837 (Ill. 2001)).⁴⁷

In *Pelt*, the appellant's infant son died from brain injuries caused by blunt-force trauma. *Id.* at 1194. The appellant told authorities that when the baby would not stop crying, he tried to throw him on the bed, but threw him too far. *Id.* at 1195. The baby hit the dresser and died. *Id.* The appellant was convicted by a jury of aggravated battery of a child and felony murder, but was acquitted of the charge of knowing murder. *Id.* In upholding the lower appellate court's reversal of the felony-murder conviction, the Illinois Supreme Court stated:

Our task here is to discern from defendant's conduct whether defendant's aggravated battery was an act that was inherent in, and arose out of, the killing of the infant. . . . *The act of throwing the infant forms the basis of defendant's aggravated battery conviction, but it is also the same act underlying the killing.* Therefore . . . it is difficult to conclude that the predicate felony underlying the charge of felony murder involved conduct with a felonious purpose other than the conduct which killed the infant.

⁴⁷ While this limiting rule imposed by the Illinois judiciary is not termed the merger doctrine, the application and effect of the rule is essentially the same.

Id. at 1197 (emphasis added). The court also reasoned that without such limitations on felony murder, the State could avoid proving an intentional or knowing murder in most instances of homicide. *Id.* Thus, the Court’s holding “ensures that [the] defendant will not be punished as a murderer where the State failed in proving to the jury that a knowing murder occurred.” *Id.*

3. States with enumerated predicate felonies in their felony-murder statutes.

The vast majority of states and the federal government have statutorily limited the application of the felony-murder rule by enumerating the predicate felonies.⁴⁸ Many of these

⁴⁸ Alabama, Ala. Code § 13A-6-2; Alaska, ALASKA STAT. ANN. §§ 11.41.100, 11.41.110; Arizona, ARIZ. REV. STAT. ANN. § 13-110; California, CAL. PEN. CODE § 189; Colorado, COLO. REV. STAT. ANN. § 18-3-102; Connecticut, CONN. GEN. STAT. ANN. § 53a-54c; Idaho, IDAHO CODE ANN. § 18-4003; Illinois, 720 ILL. COMP. STAT. ANN. 5/9-1, 5/2-8; Indiana, IND. CODE ANN. § 35-42-1-1; Iowa, IOWA CODE ANN. § 702.11; Kansas, KAN. STAT. ANN. § 21-5402; Louisiana, LA. STAT. ANN. §§ 14:30, 14:30.1; Maine, ME. REV. STAT. TIT. 17-A, § 202; Maryland, MD. CODE ANN., CRIM. LAW § 2-201; Mississippi, MISS. CODE ANN. § 97-3-19; Montana, MONT. CODE ANN. §§ 45-5-102, 45-2-101; Nebraska, NEB. REV. STAT. ANN. § 28-303; Nevada, NEV. REV. STAT. ANN. § 200.030; New Hampshire, N.H. REV. STAT. ANN. § 630:1-b; New Jersey, N.J. Stat. Ann. § 2C:11-3; New York, N.Y. PENAL LAW § 125.25; Ohio, OHIO REV. CODE ANN. § 2903.02; Oregon, OR. REV. STAT. ANN. § 163.115; Pennsylvania, 18 PA. STAT. AND CONS. STAT. ANN. § 2502; Rhode Island, 11 R.I. GEN. LAWS ANN. § 11-23-1; South Dakota, S.D. CODIFIED LAWS § 22-16-4; Tennessee, TENN. CODE ANN. § 39-13-202; Utah, UTAH CODE ANN. §§ 76-5-202, 76-5-203; Vermont, VT. STAT. ANN. TIT. 13, § 2301; Virginia, VA. CODE ANN. § 18.2-32; West Virginia, W. VA. CODE ANN. § 61-2-1; Wisconsin, WIS. STAT. ANN. § 940.03; Wyoming, STAT. ANN. § 6-2-101; United States, 18 U.S.C. § 1111.

Seven states enumerate felonies under their highest-graded felony murder statutes, but allow for any felony to serve as a predicate felony for lower-graded felony murder. Arkansas, ARK. CODE ANN. §§ 5-10-101, 5-10-102; Florida, FLO. STAT. ANN. § 782.04; Louisiana, LA. STAT. ANN. §§ 14:30, 14:30.1, 14:31; Massachusetts, MASS. GEN. LAWS ANN. ch. 265, § 1; Mississippi, MISS. CODE ANN. § 97-3-19; Oklahoma, OKLA. STAT. ANN. TIT. 21, §§ 701.7, 701.8; Washington, WASH. REV. CODE ANN. §§ 9A.32.030, 9A.32.050.

Montana enumerates predicate felonies, but also allows for any forcible felony—defined as “a felony that involves the use or threat of physical force or violence”—to serve as an underlying felony. MONT. CODE ANN. §§ 45-5-102, 45-2-101. Similarly, Alabama enumerates predicate

states further narrow the application of felony murder by excluding (non-sexual) assaultive felonies from their statutory list of predicate felonies.⁴⁹ By keeping assaultive felonies off the list, these states largely avoid the merger or same-act problem. For example, a kidnapping or robbery predicate felony will almost always involve a separate act causing death. Additionally, in almost every state that lists some form of assaultive offense as a predicate felony, such as child abuse or aggravated battery, the prosecution must prove the defendant committed the underlying felony intentionally or knowingly.⁵⁰

This survey of other jurisdictions demonstrates that every other state and the federal government strive to ensure that the felony-murder rule is limited in one way or another. While the Texas Legislature did include limiting language in Section 19.02(b)(3), the lack of strict adherence to that language by this Court allows for the imposition of felony-murder liability for any accidental death caused in the course of any felony or attempted felony. If

felonies, but also allows for “any other felony clearly dangerous to human life” to serve as a predicate. ALA. CODE § 13A-6-2.

⁴⁹ See, e.g., COLO. REV. STAT. ANN. § 18-3-102 (listing arson, robbery, burglary, kidnapping, sexual assault, or escape as predicate felonies); IND. CODE ANN. § 35-42-1-1 (listing arson, burglary, child molesting, consumer product tampering, criminal deviate conduct, kidnapping, rape, robbery, human trafficking, promotion of human labor trafficking, promotion of human sexual trafficking, promotion of child sexual trafficking, promotion of sexual trafficking of a younger child, child sexual trafficking, or carjacking as predicate felonies); NEB. REV. STAT. ANN. § 28-303 (listing sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary as predicate felonies); VA. CODE ANN. § 18.2-32 (listing arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction as predicate felonies).

⁵⁰ States that do include assaultive felonies in their predicate list include: Alabama, Arizona, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Utah, Wisconsin, Wyoming. See *supra* note 48 for citations to statutes.

this Court were to adopt a strict interpretation of our Texas felony-murder statute as it is written, then Texas courts would stand with the high courts of other states to ensure that felony-murder is properly restricted.

E. This Court’s history of interpreting Texas Penal Code Section 19.02(b)(3).

In the years following the 1974 Penal Code revision, this Court strictly construed the applicable statute. Shortly thereafter, however, this Court strayed from its strict construction. Since then, this Court’s felony-murder opinions have greatly expanded the application of felony murder in a manner that is inconsistent with the statutory language, the legislative intent, and the overall purpose of the felony-murder doctrine.

1. *Rodriguez* held that the predicate felony for felony murder required a *mens rea* of intent, knowledge, or recklessness.

Rodriguez v. State was the Court’s first opinion interpreting the then newly-enacted felony-murder statute. 548 S.W.2d 26 (Tex. Crim. App. 1977). In *Rodriguez*, the Court considered whether proof of a culpable mental state was required to support a felony-murder conviction. Noting that the felony-murder statute did not contain any culpable mental state, nor did it plainly dispense with such a requirement, the Court held that Section 6.02(b) of the Texas Penal Code “mandates that the culpable mental state shall, as specified in § 6.02(c), be one of intent, knowledge or recklessness.” *Id.* at 28. The Court reasoned that proof of culpability was supplied by the *mens rea* accompanying the underlying felony. *Id.* at 28-29. No separate proof of a culpable mental state was required with respect to the “act clearly

dangerous to human life.”⁵¹ *Id.* at 29.

2. *Garrett’s holding, which later became known as the “merger doctrine,” required that the “act clearly dangerous to human life” be separate and distinct from the predicate felony.*

In *Garrett v. State*, this Court considered the very question presented by this case: In a felony-murder prosecution, can a single act committed by the defendant leading to the death of another provide proof of both the underlying felony and the “act clearly dangerous to human life” that is in furtherance of the felony? 573 S.W.2d 543 (Tex. Crim. App. 1978). The Court determined that the answer to this question was ‘no.’ *Id.* at 546. The Court held that if the conduct comprising the underlying felony is “one and the same” as the act resulting in the homicide, then the elements of felony murder are not satisfied. *Id.* Despite being based on the statutory language, this holding was referred to as the “merger doctrine” in later cases.⁵²

Garrett was charged with felony murder with the predicate felony of aggravated assault by threat after he argued with a store cashier, pulled out a weapon to threaten him, and killed the cashier when the gun accidentally discharged. *Id.* at 544. On appeal, Garrett

⁵¹ While the Court in *Rodriguez* focused on the *mens rea* issue, the fact that it analyzed whether the “separate act” required its own *mens rea* distinct from the felony demonstrates that the Court interpreted the felony-murder statute as requiring both a felony and a distinct act that was clearly dangerous to human life.

⁵² Personally, I do not approve of the term “merger doctrine” or “merger rule.” Using such a term suggests that the merger rule was nothing more than a judicially-created doctrine, when, in fact, *Garrett’s* holding was firmly rooted in the plain language of the statute. As discussed *supra*, the felony-murder statute requires that there be “an act clearly dangerous to human life” that is separate from the predicate felony. TEX. PENAL CODE § 19.02(b)(3). But, because later cases refer to *Garrett’s* holding as the “merger doctrine” or “merger rule,” I use those terms in this opinion.

asked “whether the felony-murder doctrine, as codified in Sec. 19.02(a)(3),⁵³ should apply where the precedent felony is an assault and is inherent in the homicide.” *Id.*

The Court started its analysis by noting that the felony-murder statute does not expressly include a *mens rea*.⁵⁴ Instead, “the culpable state of mind for the act of murder is supplied by the mental state accompanying the underlying . . . felony giving rise to the act.” *Id.* at 545 (quoting *Rodriquez*, 548 S.W.2d at 29). There is a ““transference of the mental element establishing criminal responsibility for the original act to the resulting act”” causing death. *Id.* (quoting *Rodriquez*, 548 S.W.2d at 29). Because the mental state must transfer from one act to another, the Court reasoned that, to support felony murder, there must be a dangerous act causing death that was in addition to and separate from the felony. *Id.* at 546. Otherwise, the State could forgo pursuing intentional murder charges in many cases and instead simply pursue a felony-murder charge, thereby eliminating the State’s burden to prove that the defendant intended to cause the death. *Id.*

The Court further noted that the vast majority of United States jurisdictions hold “that a felonious assault resulting in death cannot be used as the felony which permits application of the felony murder rule to the resulting homicide.” *Id.* at 545. Allowing the dangerous act causing death to be one and the same as the felony “would mean that every homicide, not justifiable or excusable would occur in the commission of a felony with the result that intent

⁵³ The felony-murder statute was previously codified at Penal Code Section 19.02(a)(3), and has since been moved to Section 19.02(b)(3).

⁵⁴ While *mens rea* is not an issue in *Fraser* upon which we granted review, analyzing this issue does shed light upon the policy considerations underlying the legislative requirement that the death be caused by a dangerous act which is distinct from the underlying felony.

to kill and deliberation and premeditation would never be essential.” *Id.* (quoting *People v. Moran*, 158 N.E. 35 (N.Y. 1927)). Thus, “[t]he felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein.” *Id.* (quoting *Moran*, 158 N.E. 35).

Applying these principles in Garrett’s case, the Court held that Garrett’s single act (e.g., pulling out the gun, which discharged and struck and killed the victim) could not satisfy the proof necessary to establish both the underlying felony and the act clearly dangerous to human life. *Id.* at 546. The Court stated, “The aggravated assault and the act resulting in the homicide were one and the same. The application of the felony-murder doctrine to situations such as this is an attempt to split into unrelated parts an indivisible transaction. *There must be a showing of felonious criminal conduct other than the assault causing the homicide.*” *Id.* (emphasis added). The Court concluded, “[a]ny other result in this case would allow circumvention of the statutory limits of the felony murder statute.” *Id.*

Despite this strong analysis, the *Garrett* Court also based its decision to reverse the conviction on the fact that Garrett’s commission of aggravated assault would be a lesser-included offense of manslaughter, and, therefore, fell within the statutory exception for voluntary or involuntary manslaughter. *Id.* By providing these two alternative rationales, which the Court discussed interchangeably throughout the opinion, the *Garrett* Court muddied the waters of what could have been a clear, statutorily-based opinion. This lack of clarity and confusion is reflected in the Court’s subsequent cases attempting to interpret *Garrett*.

3. The Court chips away at *Garrett* with its opinions in *Easter*, *Aguirre*, and *Murphy*.

***Ex parte Easter* indicated a possible departure from *Garrett*.**

Several years after *Garrett*, this Court issued a decision denying post-conviction habeas corpus relief in *Ex parte Easter*, 615 S.W.2d 719 (Tex. Crim. App. 1981). *Easter* marked the beginning of a period of confusion surrounding the proper interpretation of *Garrett*, with one case building off of the prior one, which eventually led to *Garrett* being virtually abandoned.

Easter was convicted of felony murder with the underlying felony of injury to a child. *Id.* at 720. In his habeas application challenging his conviction, Easter contended: (1) that the acts used to satisfy the underlying felony’s elements “were the same acts that the state alleged caused the death of” the child victim such that his conviction was barred under *Garrett*; and (2) that the trial court improperly instructed the jury that felony murder could be found with a showing of criminal negligence as the *mens rea* for injury to a child, which was prohibited under *Rodriquez*’s holding. *Id.*

Rather than directly addressing Easter’s arguments by conducting an analysis under *Garrett* and *Rodriquez*, the Court instead focused on transferred intent. *Id.* (“We are here concerned with the felony murder rule and the theory of transferred intent.”). Applying a faulty interpretation of *Garrett*’s transferred-intent holding,⁵⁵ the Court then summarily held

⁵⁵ The Court misstated *Garrett*’s holding regarding transferred intent by indicating that *Garrett* rejected the doctrine of transferred intent:

Primary reliance is placed on *Garrett*, wherein it was held that the intent with which the act of aggravated assault was committed could *not* be transferred to the act which

that Easter's reliance on *Garrett* was misplaced and that *Garrett* was inapplicable. *Id.* The Court further found that unlike the aggravated assault at issue in *Garrett*, injury to a child was "not a lesser included offense to the crime of murder." *Id.* at 721. More broadly, the Court sought to limit the scope of *Garrett*, but did so in vague terms, stating, "[T]he language carefully chosen in *Garrett* should not be given an overly broad meaning. Not every assaultive offense, if alleged as an underlying felony, will merge with the homicide in a felony murder indictment." *Id.*

Ultimately, the Court failed to address the substance of Easter's argument based on *Garrett*'s and *Rodriquez*'s holdings, and failed to conduct any statutory analysis. Instead the Court simply stated, "Petitioner may not, in this habeas corpus proceeding, collaterally attack

caused the homicide. In so holding we held that there must be "a showing of felonious criminal conduct other than the assault causing the homicide."

Easter, 615 S.W.2d at 720 (internal citation omitted) (quoting *Garrett*, 573 S.W.2d at 546) (emphasis added). But to the contrary, *Garrett* never undermined, and actually supported in its analysis, the doctrine of transferred intent. *Garrett* stated, "The felony murder rule dispenses with any inquiry into the *mens rea* accompanying the homicide itself. The underlying felony supplies the culpable mental state. . . . 'The transference of the mental element establishing criminal responsibility for the original act to the resulting act conforms to and preserves the traditional *mens rea* requirement of the criminal law.'" *Garrett*, 573 S.W.2d at 545 (quoting *Rodriquez*, 548 S.W.2d at 29). Part of *Garrett*'s reasoning that there must be a dangerous act separate and apart from the underlying felony was the fact that, under the doctrine of transferred intent, if the act and the felony are one and the same, then there is no place for the intent to be transferred:

The felony murder rule calls for the transfer of intent from one criminal act to another, from the underlying felony to the act causing the homicide. In the present case appellant pulled a gun which went off, striking the victim. The aggravated assault and the act resulting in the homicide were one and the same. The application of the felony murder doctrine to situations such as this is an attempt to split into unrelated parts an indivisible transaction. There must be a showing of felonious criminal conduct other than the assault causing the homicide.

Garrett, 573 S.W.2d at 545-46 (internal citation omitted).

the sufficiency of the evidence to support the conviction.” *Id.*

***Aguirre I* (original opinion) expressed renewed support for *Garrett*.**

A few months later in *Aguirre v. State*, the Court continued to muddy the waters by reaffirming the merger rule of *Garrett* in a manner seemingly at odds with *Easter*. 732 S.W.2d 320 (Tex. Crim. App. 1982) (hereinafter “*Aguirre I*”). In *Aguirre I*, the indictment alleged two theories of liability for a killing: (1) an intentional or knowing killing, or (2) felony murder. *Id.* at 321. The felony-murder indictment alleged the predicate felony of criminal mischief, and further alleged that the act clearly dangerous to human life was shooting a gun into an occupied dwelling, thereby causing a death. *Id.* The facts at trial showed that Aguirre had fired a shotgun through the door of his ex-wife’s home, striking and killing his daughter who was inside. *Id.* The jury found Aguirre guilty by a general verdict and did not indicate upon which theory of guilt it relied. *Id.* at 322.

The Court reversed the conviction, noting that if the jury had convicted Aguirre on the basis of the felony-murder theory, “its verdict could not be sustained for the reasons set forth in *Garrett*.” *Id.* Specifically, the Court noted that, in a prosecution for felony murder, the State may not “sustain its theory by using ‘the very act which caused the homicide . . . as the felony which boosts the homicide itself into the murder category.’” *Id.* (citing *Garrett*, 573 S.W.2d at 545). The Court also sought to limit the significance of *Easter*, noting that in *Easter* “the Court simply rejected an effort to attack collaterally the sufficiency of the evidence to support the conviction,” and that “[n]othing held in *Easter* militates against” application of *Garrett* to Aguirre’s case. *Id.* Thus, following *Aguirre I*, this Court appeared

to suggest that *Easter* was an aberration due to its procedural posture as a habeas writ.

***Murphy v. State* exempted property-related predicate felonies from *Garrett's* merger doctrine.**

Approximately a year and a half after *Aguirre I*, the Court issued its decision in *Murphy v. State*, 665 S.W.2d 116 (Tex. Crim. App. 1983). In *Murphy*, the Court yet again appeared to change course by indicating that the merger rule of *Garrett* would not apply to situations involving property-oriented underlying felony offenses.

The indictment in *Murphy* alleged that the defendant had committed felony murder predicated on arson of a habitation for the purpose of collecting insurance proceeds, and while in the course of and in furtherance of the commission of arson, he committed an act clearly dangerous to human life, to-wit: starting a fire in a habitation, thereby causing the death of another. *Id.* at 118.

On appeal, Murphy challenged his conviction for felony murder by arguing that the very same conduct—setting the fire—constituted the underlying felony as well as the “act clearly dangerous to human life,” and was thus barred under *Garrett's* merger doctrine. *Id.* at 119. The Court declined to apply *Garrett* to Murphy’s case, reasoning that Murphy’s act of arson and the resulting homicide were not the same act. *Id.* The Court never specified what separate act, apart from the arson, caused the death of the victim. The Court also failed to conduct any statutory analysis in reaching its holding. Noting these issues, Judge Teague dissented from the denial of a motion for rehearing. *Id.* at 120. Arguing for the withdrawal or overruling of the opinion, Judge Teague stated that the merger doctrine had been violated because the act of arson was the same act that caused the death:

I now find that it is clear as crystal that the State's reliance upon the same act to constitute both the underlying felony offense of arson and the act clearly dangerous to human life which caused the death of the deceased violates the doctrine of merger in that the only act shown to be the commission of the offense of arson, the underlying felony, is one and the same act which caused the death of the deceased.

Id. (Teague, J., dissenting from denial of reh'g). Judge Teague went on to point out that the statutory language of "in the course of and in furtherance of" also supports the application of the merger doctrine:

[T]he felony-murder statute contemplates that a homicide can become murder, when not committed intentionally or knowingly, only if the act which causes the death occurs in the course of and in furtherance of the commission of or attempt to commit a felony other than voluntary or involuntary manslaughter, or in flight from such commission or attempt. *Thus, it follows that the homicide can become murder only when some act evidencing the commission or attempted commission of the underlying felony offense is separate and distinct from the act which causes the death of the deceased.*

Id. (emphasis added). Despite Judge Teague's statutory analysis, the Court declined the rehearing.

It appears that in *Murphy* the Court's sole reason for distinguishing *Garrett* was that *Murphy* involved a property offense (arson), whereas *Garrett* involved an assaultive offense (aggravated assault). *See Johnson*, 4 S.W.3d at 257 (considering *Murphy* and *Garrett* and stating, "There is some suggestion that the distinction lies, not in the fact that there was a separate act, but in the fact that the underlying offense of arson was a property offense, as opposed to an offense against a person."). But Section 19.02(b)(3) makes no distinction between or amongst types of predicate felonies, apart from excepting manslaughter. Whatever the Court's intention was in *Murphy*, it would signal the beginning of a complete

abandonment of the merger rationale and a movement toward much broader application of the felony-murder rule.

***Aguirre II* (Opinion On Rehearing) doubled down on *Murphy*'s holding.**

Following *Murphy* and five years after its original opinion in *Aguirre I*, this Court withdrew its original opinion in *Aguirre I* and issued a new opinion upholding Aguirre's conviction. *Aguirre v. State*, 732 S.W.2d 320 (Tex. Crim. App. 1982) (op. on reh'g) (hereinafter "*Aguirre II*"). The Court found that its original analysis in *Aguirre I* was "untenable" in light of *Murphy*. *Id.* at 324.

In *Aguirre II*, the Court held that *Murphy* was controlling because both cases involved property-type predicate felonies. *Id.* at 325. The Court determined that Aguirre's commission of criminal mischief—that is, attempting to blow open a door with a shotgun—"was clearly a property offense," and, "[i]n the furtherance of this offense, the deceased was shot and killed." *Id.* The Court distinguished *Garrett*, noting that, unlike Garrett's situation, Aguirre's "act of criminal mischief and the deceased's resulting homicide were not one in [sic] the same." *Id.* But, as in *Murphy*, the Court failed to explain how Aguirre's conduct in shooting through the door could be divided up so as to constitute distinct proof of both the predicate felony and the act clearly dangerous to human life.

Judges Clinton and Teague dissented. Judge Teague wrote separately calling *Murphy* "terribly reasoned." *Id.* at 327. Interestingly, he supported the merger doctrine under the plain language of the felony-murder statute, but he also argued that *Garrett* should be overturned. *Id.* at 329. He argued that *Garrett* had reached an incorrect result because he

believed that two separate and distinct acts had been committed by Garrett, thereby supporting a felony-murder conviction. He noted that the Penal Code defined “act” as “a bodily movement, whether voluntary or involuntary, and includes speech.” *Id.* at 330 (citing TEX. PENAL CODE § 1.07(a)(1)). Based on this statutory definition, he found two “acts” in *Garrett*: (1) “the defendant’s pointing his pistol at the store clerk constituted the offense of aggravated assault,” and (2) “his *pulling of the trigger* constituted bodily movement, and was thus an independent ‘act’ . . . Thus, in *Garrett*, there were two separate and independent acts,” and Garrett “was properly charged and convicted” for felony murder. *Id.* (emphasis in original) (internal citations omitted).

Unlike Judge Teague’s dissenting opinion, the majority opinion in *Murphy* failed to conduct any statutory analysis. Given the Court’s cursory treatment of these issues, the logical inference to be drawn from *Murphy* was that the Court intended for *Garrett* to be limited to its facts, e.g., its holding would apply only to situations involving an underlying felony of aggravated assault.

4. *Johnson* served as the death knell for *Garrett*’s merger doctrine.

In its 1999 decision in *Johnson v. State*, this Court reconsidered *Garrett* and expressly eliminated the merger doctrine. 4 S.W.3d 254 (Tex. Crim. App. 1999). In *Johnson*, the issue was whether a person may be convicted of felony murder when the underlying felony of injury to a child consists of the same act as the “act clearly dangerous to human life” causing death. *Id.* at 254.⁵⁶ On appeal from his conviction, Johnson complained that the underlying

⁵⁶ The indictment alleged that Johnson committed the felony offense of injury to a child “and

felony and the act clearly dangerous to human life constituted a single act and had merged. Thus, relying on *Garrett*, Johnson contended that the evidence could not support a conviction for felony murder. *Id.* at 255. This Court disagreed.

The Court began its analysis by addressing *Garrett* and the cases that followed. It first cited with approval *Garrett*'s support of the theory of transferred intent, noting that "[t]he felony murder rule dispenses with the necessity of proving *mens rea* accompanying the homicide itself; the underlying felony supplies the culpable mental state." *Id.* It also reaffirmed *Garrett*'s holding that the felony-murder statute exempted not just manslaughter but any lesser-included offenses to manslaughter as well. *Id.* Notably, in affirming that aspect of *Garrett*, the Court expressly acknowledged that such interpretation is contrary to the plain language of the statute. *Id.* ("Despite the plain language, we have interpreted section 19.02(b)(3) as exempting from the felony murder rule not only manslaughter, but also lesser included offenses of manslaughter."). Then, ironically, while upholding *Garrett* for judicially amending the plain language of the felony-murder statute, the Court then struck down *Garrett*'s adoption of the merger doctrine which was founded on the statute's plain language. *Id.* at 258.

Once again, the Court conducted no statutory analysis in its *Johnson* opinion. Nowhere in *Johnson* does the Court discuss the Legislature's use of "and" to separate the

while in the course of and furtherance of commission of said offense, did then and there commit an act clearly dangerous to human life, to-wit: hitting [the victim] with a deadly weapon, to-wit: a blunt object. . . ." *Johnson v. State*, 4 S.W.3d 254, 254 (Tex. Crim. App. 1999). The indictment alternatively alleged that Johnson had committed felony murder by committing injury to a child, with the alleged act clearly dangerous to human life of causing the victim to come into contact with a deadly weapon, to-wit: a blunt object. *Id.*, n. 1.

underlying felony from the “act clearly dangerous to human life.” Nowhere in *Johnson* does the Court discuss the Legislature’s use of “in the course of and in furtherance of” or “in immediate flight from the commission or attempt.” Nowhere in *Johnson* does the Court discuss the Legislature’s wording that it is the separate “act,” and not the felony itself, that must “cause[] the death of an individual.” Instead, the Court relied solely on case law. Through its holding in *Johnson*, the Court effectively excised these key aspects of the statutory language, rendering words and phrases meaningless and permitting a single act to serve as proof of both the underlying felony and the dangerous act causing death. *Id.*

5. The Court’s post-*Johnson* opinions reflect an approach to felony murder that is untethered from the plain statutory language.

This Court’s post-*Johnson* felony murder opinions are reflective of the extent to which the Court’s current approach has deviated from the statutory requirements for felony murder. Since *Johnson*, this Court has effectively permitted conviction for felony murder anytime a person engages in a felony or attempted felony (other than manslaughter and lesser-included offenses) and causes a death. As a practical matter, this approach has eliminated from the statute the requirement of proof of a separate act clearly dangerous to human life that is committed “in the course of and in furtherance of” the felony. Three additional cases that reflect the Court’s current approach are *Lawson*, *Lomax*, and *Bigon*.

In *Lawson v. State*, Lawson argued that because the aggravated assault was the same act that killed the victim, his felony-murder conviction should be overturned. 64 S.W.3d 396 (Tex. Crim. App. 2001). Relying on *Johnson*, the Court upheld Lawson’s conviction, noting

that the merger rule from *Garrett* was no longer viable, except to the extent that felony murder “will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter.” *Id.* at 397 (citing *Johnson*, 4 S.W.3d at 258). The Court explained that the only real question in Lawson’s case, therefore, was whether an intentional or knowing aggravated assault is a lesser-included offense of manslaughter. *Id.* Because an intentional or knowing aggravated assault is not a lesser-included offense of manslaughter, which carries a culpable mental state of recklessness, this Court held that the conviction for felony murder was permissible. *Id.* Nowhere in *Lawson* did the Court conduct any statutory analysis of the felony-murder statute.

Several years later, in *Lomax v. State*, this Court considered whether the offense of felony driving while intoxicated (“felony DWI”)⁵⁷ could be the underlying felony in a felony-murder prosecution when felony DWI has no required *mens rea*. 233 S.W.3d 302, 303 (Tex. Crim. App. 2007). The Court answered this question in the affirmative, expressly overruling *Rodriquez* and finding that felony murder requires no *mens rea*. *Id.* at 307. In resolving Lomax’s complaint, the Court ignored the plain language of the Penal Code (see discussion of *Rodriquez*, *supra*) and further expanded the applicability of the felony-murder rule by holding that predicate felonies with no culpable mental state requirement, such as felony DWI, may give rise to a felony-murder conviction. *Id.* at 305-06.

Also at issue in *Lomax* was whether the facts supported a finding of felony murder. The Court observed that the defendant was “committing felony DWI on a crowded public

⁵⁷ See TEX. PENAL CODE § 49.09(b)(2).

street and also tailgating, speeding and weaving when his car collided with another car resulting in the death of a five-year-old girl.” *Id.* at 303.⁵⁸ In a footnote, the Court determined that “the evidence, therefore, shows that the victim’s death occurred ‘in the course of and in furtherance of’ appellant’s commission of an inherently dangerous felony DWI.” *Id.* at 303 n. 4. In support of its reasoning, rather than conducting a statutory analysis, the Court cited *Johnson*, as well as Judge Cochran’s concurring opinion in *Lawson*, for the proposition that a felony-murder conviction “can be based upon the underlying felony without proof of any additional dangerous act beyond that covered by the underlying felony.” *Id.* (citing *Johnson*, 4 S.W.3d at 255-58; *Lawson*, 64 S.W.3d at 400-01 (Cochran, J., concurring)). The Court never addressed how speeding, weaving, and tailgating were “in furtherance of” driving while intoxicated, in the sense that those actions promoted or facilitated the commission of DWI. Neither did the Court conduct any analysis as to whether any of the dangerous acts aside from driving while intoxicated caused the death.

Finally, in *Bigon v. State*, this Court again upheld a felony-murder conviction where the underlying felony was felony DWI. 252 S.W.3d 360 (Tex. Crim. App. 2008). The indictment alleged that the act clearly dangerous to human life in *Bigon* was “driv[ing] a heavily loaded Jeep towing a loaded trailer across the center stripe of a roadway into the oncoming lane of travel.” *Id.* at 366. Bigon contended that the evidence was insufficient to

⁵⁸ The indictment in *Lomax* alleged, “the defendant while in the course of and the furtherance of the commission of [felony DWI] did commit an act clearly dangerous to human life, to wit: by operating his motor vehicle . . . at an unreasonable speed, by failing to maintain a proper lookout for traffic and road conditions, and by failing to take adequate evasive actions prior to striking a motor vehicle occupied by [the victim] and did thereby cause the death of [the victim].” *Lomax*, 233 S.W.3d at 304 n.5.

show that he committed a dangerous act that was “in furtherance of” felony DWI as required by the felony-murder statute. Bigon contended that the “in furtherance of” language meant that the act clearly dangerous to human life “must advance or promote the commission of the underlying felony, and that, in this case, the act of driving into oncoming traffic did nothing to advance the commission of felony DWI and even halted its commission.” *Id.*

The Court, with little explanation and no statutory analysis, held: “[W]e disagree with [Bigon’s] argument that driving into the other lane was not in furtherance of driving while intoxicated. A fact-finder could rationally have found beyond a reasonable doubt that Appellant committed an act clearly dangerous to human life in furtherance of felony DWI.” *Id.*

The foregoing cases illustrate the Court’s lack of consistent reasoning and a lack of rigor in applying the statutory language in felony-murder cases. Over the years the Court has abandoned the statutory requirements of: (1) a distinct act clearly dangerous to human life that may not be wholly subsumed within the predicate felony itself; and (2) the distinct act being “in furtherance” of the felony’s commission. This abandonment has resulted in a vast expansion of felony murder well beyond what the Legislature intended.

Now, under the Court’s current interpretation, almost any felonious conduct (whether inherently dangerous or not) that results in an accidental or unintended death (regardless of whether the actor has a culpable mental state) may be elevated to strict-liability first-degree felony murder. This expansive interpretation not only violates the statutory language, but it also violates the criminal justice grading scheme which requires proof of aggravating factors

before an offense is elevated to a higher-degree felony and/or punishment range. For all of the foregoing reasons, I cannot agree with the course taken by this Court's interpretation.

Conclusion

I dissent to the Court's opinion: (1) more broadly to the Court's current interpretation and application of our felony-murder statute; and (2) more specifically in this case to the fact that the Court fails to fully address the designated issue, in that the Court allows a felony-murder conviction based upon a single act.

First, a plain-language interpretation of our felony-murder statute, Texas Penal Code Section 19.02(b)(3), requires each of the following elements: (1) the defendant committed or attempted to commit a felony; (2) during the course of the felony's commission or its attempt, the defendant committed an additional act (separate and distinct from the underlying felony and not subsumed within that felony) that was clearly dangerous to human life; (3) the dangerous act was committed in the course of the commission or attempted commission of the felony; (4) the dangerous act was committed in furtherance of (to advance) the commission or attempted commission of the felony; and (5) the dangerous act caused the death of an individual. Not only does the plain language of the statute support this interpretation, but the statute's legislative history, the history of felony murder in Texas and in America, and the way that other states interpret and apply their felony-murder statutes also overwhelmingly support this interpretation.

The Court's current interpretation of felony murder abandons most of these elements.

Essentially, the Court has changed and limited the elements to: (1) the defendant

committed or attempted to commit a felony other than manslaughter or a lesser-included offense of manslaughter; (2) during the commission or attempted commission of the underlying felony, the defendant's action caused the death of another. This is a vast expansion of the felony-murder statute and allows for strict, first-degree felony-murder liability for virtually any accidental or unintended death that occurs during the commission or attempted commission of any felony other than manslaughter or a lesser-included offense of manslaughter.

Second, in Fraser's case, the Court conducts no statutory interpretation, leaving its current interpretation in place, and decides solely that because the underlying felonies of injury to a child and child endangerment are not lesser-included offenses to manslaughter that Fraser's conviction is proper. In doing so, the Court fails to address the designated issue that requested a determination of whether a single act could serve as both the underlying felony and the clearly dangerous act.

Moreover, the Court's opinion upholds Fraser's felony-murder conviction based upon a single act. The single act alleged by the State—dosing a baby with diphenhydramine—cannot satisfy the separate elements of an underlying felony and an act clearly dangerous to human life. While I do not agree with all of the court of appeals' reasoning supporting its decision to reverse Fraser's felony-murder conviction, we should affirm its judgment and remand for a new trial. Accordingly, I strongly but respectfully dissent.

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